INDEPENDENCE, IMPARTIALITY, AND IMMUNITY OF ARBITRATORS—US AND ENGLISH PERSPECTIVES

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I. WHO CONTROLS THE ARBITRAL PROCESS?

At the 2002 conference of ICCA (International Commercial Congress of Arbitration), the conference participants debated the following proposition: 'the parties, not the arbitrators, control the arbitration.' Thus, the proposition permitted only two answers—either the parties or the arbitrators control the arbitral process. Both answers were consistent with the contractualist theory of arbitration:

> (a) the parties have the right to control the process and in fact maintain that right during the process; or (b) the parties' agreement to arbitrate their disputes entails their agreement to let the arbitrator(s) control the process.

However, the proposition does not allow for the correct answer: the State, not the parties and not the arbitrators, controls the arbitral process. It is only the State that can cede powers to the parties and to the arbitrators. The State's role, and the validity of the concessionary theory, is apparent from a consideration of (i) the principle of independence and impartiality of arbitrators; and (ii) the principle of arbitrator's immunity.

II. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS[1]

In the field of international commercial arbitration, an issue that is fundamental to the arbitral process is preserving the independence and impartiality of the arbitrators. Independence and impartiality are two different concepts. The terms are not interchangeable but are often used interchangeably. It is possible to distinguish between independence and impartiality, for example, 'An impartial arbitrator, by definition, is one who is not biased in favour of, or prejudiced against, a particular party or its case, while an independent arbitrator is one who

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[1] See J Konner, 'Fred Friendly 1915–1998,' *Columbia Journalism Review* (May/June 1998), publisher's note.

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has no close relationship—financial, professional, or personal—with a party or its counsel.'[2] It is generally agreed that impartiality is primarily about an attitude of mind which as an abstract concept is difficult to measure, whereas independence is a necessary external manifestation of what is required as a prerequisite of that attitude and is an objective examination into the relationship between the parties and appointed arbitrators. This is summed up in Bishop and Reed's[3] article: 'An arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified. In selecting party-appointed arbitrators in international arbitration, the absolutely inalienable and predominant standard should be impartiality.' The interchangeable usage of these two terms can be seen in the cases discussed below as well as in the general term of bias used in the Draft Joint Report of the Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration, 7 October 2002 (the IBA Draft hereinafter).

Independence and impartiality have become an increasing problem mainly due to the globalisation of law firms. As law firms have become more global, potential client conflicts have increased. A set of circumstances recently described by Dr Otto de Witt Wijnen at the LCIA AMINZ Arbitration Seminar pinpointed a problem that is now often seen in arbitration today. A local partner of a major international law firm in Hong Kong was involved 7 years ago in a conveyance for a local company that later was merged into another company in the UK. A London based partner in the law firm is acting as arbitrator in a dispute in which this parent company is involved. Should he be challenged successfully?

Recent court cases in England and the United States have promulgated standards that afford broad support for arbitrators whom a party seeks to challenge on grounds of bias. The Anglo-American approach enables arbitrators and arbitral institutions to take a strong stand against refusal if they wish to exercise the full extent of their rights. To be sure, the full exercise of rights can have dangerous policy consequences, and this has occasionally occurred in the context of the independence and impartiality of arbitrators. However, whether one agrees with the recent court trend as a policy matter, it is clear that it is the State that sets the contours of the definition of 'independence and impartiality'.

Independence and impartiality underpin the entire arbitral process. Without their assured vitality, arbitration as the favoured dispute resolution method in international commercial contracts will have a troubled future. The parties to

[2] A Redfern and M Hunter *The Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 1999), at 220–1. See also D Bishop and L Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' 14 (1998) 395 *Arbitration International*. <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=9633>.

[3] Above n 2, at 400. IBA uses the wording 'bias /conflict of interest' to cover these issues.

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an arbitration want confidence that they are receiving 'private justice'. Because 'private' means that the normal array of public protections (for example, appellate review) are generally unavailable, arbitrators and arbitral institutions should be proactive in establishing at the outset of an arbitration that a party cannot reasonably question independence and impartiality. Indeed, this was Justice Hugo Black's view in the only US Supreme Court decision to consider the issue: 'We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias* [emphasis added].'[4]

Judges, arbitrators, and arbitral institutions are rightly concerned that a challenge to an arbitrator's independence or impartiality can be no more than a delaying tactic or an improper attempt to influence the composition of the arbitral tribunal or, later in the process, a cynical effort to evade the finality of an unfavourable award. There are associated beliefs—not as well founded—that a lower threshold of disqualification would significantly diminish the pool of arbitrators with the necessary credentials to hear cases,[5] and that, in any event, justice is justice, so if a standard is good enough for the courts, it is good enough anywhere else. Hence the promulgation of a disqualification standard equal to that of national court judges and higher than 'appearance of bias'. As noted above and indicated more fully below, these beliefs can be problematic as a policy matter, because of the general unavailability of normal court protections.[6] Still, the key point for present purposes is the State's overriding role in setting limits.

A. Arbitration Rules: The 'Justifiable Doubts' Standard

Cases on the disqualification of arbitrators often come to the national courts because an arbitral institution has refused to grant a challenge made by one of the parties. Precisely because the judicial standard for disqualification of arbitrators is so difficult to meet, it is important to have an understanding of the standards for disclosure and disqualification set out in the rules of and applied by some of the major Western arbitral institutions, such as the International

[4] *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145 (1968) at 149. See discussion below on the dilution of Justice Black's position by the Court's concurring opinion and lower court interpretations of the case in the 1980s and 1990s.

[5] The majority of international arbitral tribunals are composed of lawyers who, while they may have acted previously in cases involving a particular industry, do not necessarily have experience as *businessmen* in any particular industry. It is doubtful that a shortage exists of civil practitioners in England and the United States who are capable of producing well-reasoned arbitral awards.

[6] Justice Black's reasoning that 'we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review', should prompt the international arbitration community to adopt practices that reach beyond mere survival of national court scrutiny.

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Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and Stockholm Chamber of Commerce (SCC).[7] Because the arbitrator in a contested challenge will be informed of the grounds for the challenge, it is also important to understand how the arbitral institutions decide such challenges. Unfortunately, there is little concrete guidance on this point, and as a practical matter, it is difficult to imagine how such guidance could be given—which is one reason why the arbitrators themselves should embrace a comprehensive investigation and disclosure obligation, coupled with a general willingness to withdraw when challenged on a matter that has been disclosed. This difficulty was expressly acknowledged by the IBA Working Group in the Draft, which states: 'it is not an easy task to try to formulate examples for the various lists. First, similar situations were perceived differently depending from which jurisdiction the member of the Working Group comes and, secondly, there is a problem of open wording situations which are not specific enough and need interpretation' as well as '[i]t is hoped that with this the Guidelines will be able to influence the institution's practice of accepting or denying arbitrators. It is also hoped that the proposals of the Working Group will be taken into account by State courts when deciding over conflict of interest issues in international commercial arbitration.'[8]

With the exception of the ICC Rules, each of institutions mentioned above, as well as the UNCITRAL Arbitration Rules and the IBA Draft, has expressly adopted a 'justifiable doubts' standard regarding impartiality or independence. The AAA-International Rules and the UNCITRAL Rules also expressly include a 'justifiable doubts' standard regarding an arbitrator's disclosure obligations.[9] However, Article 7(2) and (3) of the ICC Rules, instead refer to a prospective (and sitting) arbitrator's obligation to disclose 'any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties'. This is arguably a broader disclosure obligation than 'justifiable doubts' (if 'independence' comprises 'impartiality'), as the ICC provision expressly identifies the '*eyes of the parties*' as the controlling consideration for disclosure. However, unlike the other sets of rules mentioned above, the ICC challenge provisions in Articles 7 and 11 do not indicate a standard of any sort, much less a 'justifiable doubts'

[7] In the case of ad hoc arbitration under the UNCITRAL Rules, the appointing institution, under Art 12, makes the decision when a challenge is contested.

[8] 1.1 of the IBA Draft 2002.

[9] See LCIA Rules, Art 10.3 (an arbitrator may be challenged 'if circumstances exist that give rise to justifiable doubts as to his impartiality or independence'); AAA-International Rules, Arts 7.1 and 8.1 (an arbitrator shall disclose any circumstance likely to give rise to justifiable doubts as to impartiality or independence; a party may challenge whenever circumstances give rise to justifiable doubts as to impartiality or independence); 'SCC Rules, Art 17(2) (a 'person asked to accept an appointment as arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality and independence'); UNCITRAL Rules, Arts 9 and 10 (same as the AAA-International Rules noted above).

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standard, to be applied by the ICC International Court of Arbitration when deciding challenges.

If party autonomy is the foundation of arbitration, then a 'justifiable doubts' standard adopted by most arbitral institutions should be respected. However, the question of independence and impartiality is not and should not be left to the parties and the arbitral institutions to determine; the State's concessionary power controls this question. Such control can and should be tightened, as the discussion below of English and US court decisions indicates.

B. England's 'Real Danger of Bias' Standard

Two years ago, in *AT & T Corp v Saudi Cable Co*,[10] England's Court of Appeal established the disqualification test for arbitrators on grounds of bias. The English common law position is now clear: the test to be applied on a complaint of bias against an arbitrator is the same as that applied to a judge. Absent a showing of a 'real danger of bias', an arbitrator will not be removed by the English courts. Again, the point here is that the State sets the standard, and although there may be disagreement about the standard, there can be no question that the State controls the process.

In *AT&T* case, an eminent international lawyer and arbitrator was appointed tribunal chairman in an ICC arbitration. The tribunal issued two partial awards before *AT&T* became aware that the chairman was a non-executive director of a competitor company of *AT&T*. The competitor company also had been a disappointed bidder for the contract out of which the arbitration arose. *AT&T* lodged a challenge with the ICC based on the chairman's alleged lack of independence. The ICC rejected the challenge. The tribunal issued a third partial award. Since London was the seat of the arbitration, *AT&T* commenced legal proceedings pursuant to England's 1950 Arbitration Act[11] to revoke the chairman's appointment and set aside the awards.

It was not disputed that through a secretarial error, the copy of the chairman's CV that had been sent to *AT&T* at the time of his appointment did not indicate his relationship with the competitor company. More important, and unrelated to a secretarial omission, in his ICC 'independence statement' the chairman averred that he was independent of the parties and had nothing to disclose. The trial judge determined that the chairman had considered himself independent of the parties and 'it had never occurred to him that his non-executive directorship of Nortel could call into question his independence in the eyes of either of the parties'.[12] *AT&T* contended that had it known of the

[10] [2000] 2 All ER 625 (Comm). Lord Woolf gave the principal judgment. Lord Justice Potter and Lord Justice May wrote concurring judgments.

[11] The Arbitration Act 1996 has largely replaced the 1950 Act (and other previous arbitration legislation) for arbitrations commenced from 31 Jan 1997.

[12] Above n 11, at 631. The chairman's attitude was curious in this regard: experienced litigators are usually aware that it is common for a client to be alarmed by the prospect, and certainly

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non-executive directorship it would not have consented to the chairman's appointment. The trial judge nonetheless dismissed *AT&T*'s application, applying the 'real danger of bias' test laid down by the House of Lords for judicial disqualification. On appeal, *AT&T* argued, *inter alia*, that the 'real danger' test should not be applied to arbitrators. *AT&T* instead advanced a 'reasonable apprehension or suspicion of bias' test. This test, *AT&T* contended, was also closer to the 'justifiable doubts' test in the English Arbitration Act 1996.[13]

The Court of Appeal held that 'there is no principle on which it would be right in general to distinguish international arbitrations' from cases in court. Assuming for the sake of argument that 'reasonable suspicion' actually provided a lower threshold than 'real danger', Lord Woolf ruled that

> it would be surprising if a lower threshold for disqualification applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards, I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts.[14]

Lord Woolf's reasoning in this regard is curious and fails to explain why this opposing position was less persuasive—ie, precisely because private justice affords fewer appellate protections, and public policy promotes and recognises private justice as justice, private 'judges' should be removable on the basis of a lesser showing.[15]

Lord Woolf further stated that, in any event, the different tests were likely in practice to produce the same result.[16] Still, to the extent that 'reasonable suspicion' can be considered even a slightly lower threshold than 'real

by the actuality, of its lawyer's representation of a competitor company. Such alarm can lead to the termination of the client relationship. Lord May, for one, accepted that *AT&T* had good reason to challenge the chairman's independence because of his relationship with a competitor (646).

[13] Arbitration Act 1996, s 24(1)(a). It provides that a party may apply to the court to remove an arbitrator on the grounds 'that circumstances exist that give rise to justifiable doubts as to his impartiality'.

[14] Above n 11 at 638.

[15] J Kendall, 'Barristers, Independence and Disclosure Revisited' 16 *Arbitration International* (2000) 343 at 348–9, contends that there 'cannot be different standards for arbitrators, either lower or higher. It has been suggested that the standard should be higher because of the binding character and finality of awards. This misses the point. The standard should be effective to disqualify where real danger of bias is proved. Either the standard is effective to achieve that or it is not.' However, as the standard is 'real danger of bias', J Kendall's contention means nothing more than the standard should be effective where the standard is proved. This begs the question: assuming finality, assuming a standard lower than 'real danger' (such as 'appearance of bias'), and assuming the lower standard does not mean unreal danger, should disqualification of an arbitrator be the lower standard because even mere appearance of bias is significant where no review exists? If the alternative to 'real danger' is, in substance, no danger, then the lower standard can safely be jettisoned. But whether the danger is 'real' cannot be known, if at all, until an award is issued. It is extraordinarily difficult to prove the existence of bias in an award, as many US judges have conceded.

[16] Above n 11, at 638.

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danger,' Lord Woolf's judgment did not take into account the significance of the timing of a disqualification ruling. These two tests might well produce different results if a ruling is made before the tribunal issues any award.[17] Once an award is issued, 'reasonable suspicion' and 'real danger' merge, because the reviewing court will be less concerned with suspicion or danger than with establishing that bias infected the award.

One final point should be made about Lord Woolf's judgment. In reaching his conclusion that there was no real danger of bias in the particular case, Lord Woolf commented, *inter alia*, that the chairman was an 'extremely experienced lawyer and arbitrator who, like a judge, is both accustomed and who can be relied on to disregard irrelevant considerations'.[18] This is a troubling perspective. One relies on arbitrators and judges to disregard, for example, evidence that a party has improperly introduced on a merits issue or submissions having an emotional appeal but lacking a sound evidentiary basis. But one cannot rely on an arbitrator to disregard a conflict of interest. If experience could negate bias, then the application of any test would have to take experience levels into account. That is not justifiable under any analysis. Lord Woolf's deference to the tribunal chairman extended far beyond what was reasonable.

Unlike Lord Woolf and Lord Justice Potter, Lord Justice May was much more sympathetic to *AT&T*'s challenge to the chairman:

> it did seem to me that there was a reasonably persuasive general case that his non-executive directorship 'might be of such a nature as to call into question [his] independence *in the eyes of [one] of the parties*'. If *AT&T* had known of this directorship at the outset, an objection by them to his acting as arbitrator would, in my view, probably have been regarded as reasonable and would have been sustained [emphasis in the original].[19]

Yet, in light of all the facts and the unanimous awards already issued by the tribunal, Lord Justice May viewed the chairman's nondisclosure as an insufficient basis for the court to exercise its discretion in *AT&T*'s favour.

Many readers of the *AT&T* judgment will conclude that the case means that arbitrators and arbitral institutions can take a firm stand against parties who have the audacity to question impartiality and do so principally because they have a weak case and wish to delay the inevitable day of having to satisfy an adverse award. Such an interpretation would be defensible. However, it would be quite incomplete. International arbitration practitioners should also take from the case the message delivered by Lord Justice May: had the chairman made, upon his appointment, a proper disclosure to the parties of his relationship with a competitor of one of the parties, a challenge would have succeeded. Although Lord Justice May did not say more than this, it should

[17] Lord Justice May suggests this in his concurring judgment, discussed below.
[18] Above n 11, at 639.
[19] Ibid, at 646. The phrase 'eyes of the parties' is from Art 2.7 of the ICC Rules 1988.

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also be remembered that the chairman alone was in the position to know what disclosure to make.

At the very least, then, *AT&T* teaches that an arbitrator, perhaps under close questioning from the institution confirming his appointment, should consider whether his experience in a particular industry (telecommunications, in the *AT&T* case), which might have been a reason for his appointment, is compromised by his connection to certain companies in the industry. Such examination will inevitably be more rigorous if the arbitrator keeps in mind that the persons who need to be reassured about his impartiality are not the lawyer-colleagues who frequently appear before him and see him at conferences, but the parties themselves, who have never seen him before and will never see him again and ultimately have to justify a potentially unfavourable award to their companies on the grounds that an impartial panel issued it. *AT&T* also teaches that the State courts frame the boundaries within which matters of disclosure, independence and impartiality are finally decided.

Laker Airways,[20] one of the cases relied on in the *AT&T* judgment, provides another example of the policy need to see the issue of independence from the eyes of the parties, but the control of State in determining how far the parties can see. In *Laker Airways*, the American party objected to the appointment to the tribunal of a barrister from the same chambers as the barrister arguing the case for the opposing party.[21] Mr Justice (now Lord Justice) Rix's decision to apply the 'real danger of bias' test by following the same line of the arguments given by Saville J. in *Pilkington plc v PPG Industries Inc*[22] has been vindicated by the judgment in *AT&T*.[23] Whether he came to the correct conclusion in the particular case, even applying the 'real danger' test, is a

[20] *Laker Airways Incorporated v FLS Aerospace Limited* [1999] 2 Lloyd's Rep 45.

[21] This case already has prompted extensive commentary, and the present writers do not propose to discuss further the judgment of Mr Justice (now Lord Justice) Rix. See AH Merjian, 'Caveat Arbitor,' 17 *Journal of International Arbitration* (2000) 31, J Kendall, 'Barristers, Independence and Disclosure Revisited' 16 *Arbitration International* (2000) 343 and the debate in KVSK Nathan, 'Barristers in Chambers in England—Paragons of Virtue or Just Being Boys?' *Mealey's International Arbitration Report* (1999) 14(12) 23 and A Malek and D Quest, 'Reality of Barrister Arbitrators—A Response to Dr KVSK Nathan', *Mealey's International Arbitration Report* (2000) 15(1) 22.

[22] Unreported case 1 Nov 1989. There are no published materials at all in the UK. However, there was an anti trust case brought in Arizona, the USA, see *PPG Industries Inc, v Pilkington plc, Libbey-Owens-Ford Co*. 825 F Supp 1465; 1993 US Dist. LEXIS 9524; 1993–2 Trade Cas. (CCH) P70, 368 and *PPG Industries Inc, v Pilkington, plc, et al* 1994 U.S. App. (9th Cir) LEXIS 14427.

[23] The challenge in *Laker Airways* was brought under s 24(1) of the Arbitration Act 1996 ('justifiable doubts as to his [the arbitrator's] impartiality'), *AT&T* whereas in the challenge proceeded both under the common law (bias) and the Arbitration Act 1950 (misconduct). In his concurring judgment in *AT&T* (at 645), Lord Justice Potter stated that the question of whether the legislature introduced through Art 24(1) a statutory definition of bias different from the real danger test 'remains for future argument'. However, in light of Lord Woolf's express approval of Mr Justice Rix's application of the real danger test, it would seem that there is little room for future argument that the 'real danger' test does not apply under the 1996 Act. See also *Save and Prosper Pensions Ltd v Homebase Ltd* [2001] L & TR 11, in which Judge Rich QC applied the 'real danger of bias' test in a challenge under s 24(1) of the Arbitration Act 1996.

matter cast into doubt by Armen Merjian's analysis,[24] which demonstrates that to the extent Mr Justice Rix relied on certain US court decisions and assumptions about the operation of barristers' chambers, the *Laker Airways* judgment is not well founded. If the challenged arbitrator had recused himself, given that the confidence of one of the parties in his impartiality was undermined by its view that, whatever English traditions might be, an arbitrator and counsel from the same chambers[25] is a confusing relationship to outsiders, there would have been virtually no delay to the arbitral proceedings and no dearth of potential arbitrators to choose from. What was at stake in *Laker* had little to do with finding a balance between the expeditious progress of arbitral proceedings and maintaining the parties' confidence in the integrity of such proceedings. Rather, what truly was at stake was whether the English Bar would be able to stave off another blow at its exceptional status in the English legal system. Hence the remarkable involvement of the Bar Council, which in an *amicus* submission to the court argued that if membership in the same chambers created a conflict of interest, 'then the public interest would be harmed since public access to a pool of barristers, particularly in specialist fields, would be considerably reduced'.[26] 'Specialists' in general commercial contract matters are simply not an endangered species. Whether English barristers are an endangered species is another matter, and is doubtful, and in any event their preservation is not dependent on their appointment to international arbitral tribunals.

The practice of barristers' chambers raised concerns among the members of IBA Working Group. In the Seminar, Peter Leaver QC supported Justice Rix's argument believing that the lack of mistakes in relation to misdirecting documents in barrister's chambers is powerful evidence in support of the continuation of the practice.[27] However, while acknowledging the different styles of costing sharing in barristers' chamber can lead to different results of disqualification of a potential arbitrator, Mr Michael Lee stated that the arrangement of barristers' chambers should always be disclosed in the Statement of Independence in the case of ICC arbitration as such arrangement can raise the

[24] See Merjian, above n 18, at 31.

[25] Different chambers have different arrangements for their cost sharing. For example, they may involve two lawyers sharing the cost of common overheads, eg, rent, secretarial and administrative arrangements or they may extend to a much larger office shared by a number of lawyers who may share not only the rent and the secretarial expenses, but may also employ junior lawyers who work for a number of them. See M Lee, 'The ICC Perspective' the ICIA AMINZ Arbitration Seminar, at 49. In his article above n 22, Dr KVSK Nathan questioned whether the confusing relationship between members of chambers would be viewed as a cosy arrangement among ambitious lawyers (at 24). He pointed out that barristers consider themselves as belonging to a specific Chambers, rather than a set of Chambers, and 'They are much closer knit group than a New York law firm or a firm of London solicitors who employ far more lawyers than the average Chambers. To say that the barristers in the same Chambers are independent of each other is far from the truth' (at 25). However, in the later issue of *Mealey's*, Ali Malek QC and David Quest argued for Rix J decision, above n 22.

[26] Above n 21, at 48.

[27] Above n 26, at 56.

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parties' justifiable doubts about the arbitrator's suitability.[28] The IBA Draft also classifies the arrangement in barristers' chambers as one of the situations in the 'Grey List'[29] which indicates that the arbitrator has a duty to disclose the conflict if 'the arbitrator and the counsel for one of the parties are members of the same chamber of barristers'.[30] Moreover, the Working Group is of the opinion that a later challenge based on the fact that an arbitrator did not disclose such circumstances should be successful.

The *Laker Airways* case should not have arisen. Even if the non-party participants in international arbitration—the arbitrators, the parties' lawyers, the arbitral institutions—are content to enjoy the growth of arbitration because parties to an international contract commonly choose to avoid litigating in a foreign court, there is reason to believe that the parties themselves still want and expect, above all, a fair and just outcome to a dispute submitted to arbitration.[31] That desire and expectation cannot be fulfilled without their belief that an impartial tribunal is in place. While the 'real danger of bias' test now clearly adopted by the English courts, in relation to arbitrators, which as a policy matter is dangerous, it is clear that concessionary theory, and not the theory of party autonomy, explains the decision-making of the English courts.

C. The US 'Reasonable Person Would Have to Conclude Partiality' Standard

Despite the promising beginnings in *Commonwealth Coatings*,[32] and despite the adoption of terms differing from 'real danger', the US courts' treatment of the disqualification issue is in substance similar to that of the English courts. Although this 'falling off' from *Commonwealth Coatings* is regrettable, the US court decisions again demonstrate the validity of the concessionary theory.

In *Commonwealth Coatings*, the Court assessed a challenge to the arbitral chairman under section 10 of the US Arbitration Act, which provided (and still provides) for vacation of an award where, *inter alia*, 'there was evident partiality . . . in the arbitrators'. The chairman conducted an engineering consulting business in which one of his regular customers was the prime

[28] Above n 2 at 49.

[29] In order to resolve the problem the Working Group added three lists of possible situations. White list is a list of situations where the Working Group is firmly of the opinion that an arbitrator is free to act. Black list contains those situations where the Working Group believes that the arbitrators shall not act. In between there is a Grey list, where the Working Group is of the opinion of the arbitrators shall declare the conflicts, as those situations may give the parties justifiable doubts as to the arbitrator's impartiality and independence.

[30] 6.4.3 of the Draft. It is also interesting to note that the circumstances which 'the arbitrator is a member of the same law firm as the counsel to one of the parties' is classified under the Black List.

[31] Stephanie E Keer and Richard W Naimark, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People at the Beginning of the Case' 30(5) *International Business Lawyer*, 203.

[32] *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145 (1968).

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contractor that was a party to the arbitration.[33] The arbitration went forward without the arbitrator disclosing these details and without the challenging party (the petitioner) knowing of them until after the award was issued.

Justice Black stated that it

> is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.[34]

He further announced the efficacy of 'the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias'.[35] He supported this disclosure requirement with provisions from the rules then in force of the American Arbitration Association and from the Canon of Judicial Ethics,[36] and concluded that 'any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias'.[37] On the basis of the non-disclosure, Justice Black reversed the appellate court and vacated the arbitral award.

However, Justice Black was only able to form a majority by virtue of a concurring opinion by Justice White, joined by Justice Marshall. Consequently, 'courts have given this concurrence particular weight'.[38] Justices White and Marshall were concerned about losing 'the best informed and most capable arbitrator's', accordingly, arbitrators are not 'automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial'.[39] An arbitrator 'cannot be expected to provide the parties with a complete and unexpurgated business biography'.[40] Thus, the concurring justices limited the Court's holding as follows: 'where the arbitrator has a substantial interest in a firm which has done more than a trivial business with a party, that fact must be disclosed'.[41] This limitation drained Justice Black's opinion of much of its clear guidance and good sense.

The Circuit Courts of Appeal have effectively continued the limitation work begun by the concurring justices in *Commonwealth Coatings*. In a 1971 Second Circuit opinion, *Cook Industries*,[42] the challenge involved the

[33] The chairman had rendered services on the very projects involved in the arbitration.
[34] Above n 33, at 149. [35] Ibid.
[36] Rule 18 provided for the arbitrator 'to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator'. The 33rd Canon provided that in pending or prospective litigation before him a judge should be 'careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct'.
[37] Above n 33, at 149.
[38] *ANR Coal Co v Cogentrix of North Carolina, Inc*, 173 F 3d 493, 499, at n 3 (4th Cir 1999).
[39] Above n 33, at 150–2. [40] Ibid. [41] Ibid.
[42] *Cook Industries, Inc v C Itoh & Co* (America) Inc, 449 F 2d 106, 107–8 (2d Cir 1971), cert denied, 405 US 921, 92 S Ct 957, 30 L Ed 2d 792 (1972).

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contention that the employer of one of the arbitrators had substantial business dealings with one of the parties to the arbitration. The panel majority noted that the arbitrator's employer also did business with the challenging party and employees of the challenging party knew of the arbitrator's employer's dealings with the other party. The majority stated that in giving 'practical meaning' to the *Commonwealth Coatings* principle of disclosure of 'any dealings that might create an impression of possible bias', it was appropriate to define the arbitrator's obligation to be disclosure of dealings that 'the parties cannot reasonably be expected to be aware, ie, dealings 'not in the ordinary course of . . . business' [citation omitted]'.[43] On this basis, the majority rejected the disqualification application.

In dissent, Judge Oakes pointed to conflicting and ambiguous affidavit testimony on the issue of the extent of the business dealings between the arbitrator's employer and one of the parties. Moreover, the applicable Grain Arbitration Rules of the New York Produce Exchange required a written waiver from all parties in the event that an arbitrator had any financial or personal interest in the result of the arbitration, and no such waiver had been obtained. Citing Justice Black's position that the courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges, Judge Oakes could not accept the conclusion that a party waived disqualification because it knew that the arbitrator was employed by a company that did business with the other party. The majority's view, he believed, did not do justice to the arbitral rules, to the US Arbitration Act, to *Commonwealth Coatings*, or to the parties in the case. In his opinion, the parties could not know in advance whether to waive unless there is full disclosure: 'How are they to know whether there are transactions 'out of the ordinary course of business' unless pending transactions are disclosed?'[44] He accepted that the burden of proof should rest on the party claiming partiality, but commented that the court still had the obligation to ascertain the facts. Above all, he did not want the doctrine of waiver to be turned into a carte blanche for the nondisclosure decried in *Commonwealth Coatings*.[45]

Judge Oakes's concern over preserving the core of Justice Black's *Commonwealth Coatings* opinion became very much a minority view. The influential Judge Posner, in ruling on a nondisclosure issue in *Merit Ins Co v Leatherby Ins Co*,[46] made pronouncements about impartiality that are striking for their departure from Justice Black's view, and for providing no practical guidance on disqualification standards. However, these pronouncements from a renowned legal theorist, delivered with his characteristic assurance, have been woven into subsequent US jurisprudence on the issue, to the detriment of the arbitral process, but indicating the validity of the concessionary theory.

[43] *Cook Industries, Inc v C Itoh & Co* (America) Inc, 449 F 2d 106, 107–8 (2d Cir 1971), cert denied, 405 US 921, 92 S Ct 957, 30 L Ed 2d 792 (1972) at 108.

[44] Ibid, at 109.

[45] Ibid.

[46] 714 F 2d 673 (7th Cir 1983), cert denied, 464 US 1009 (1983).

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Merit prevailed in an arbitration against Leatherby and was awarded $10.675 million. Leatherby opposed confirmation of the award on the grounds, *inter alia*, that the three-member tribunal had been biased. The District Court rejected Leatherby's arguments and later rejected Leatherby's motion[47] to set aside the award. Leatherby appealed to the Seventh Circuit, but while the appeal was pending it filed a second Rule 60(b) motion based on its alleged discovery that the arbitral chairman had earlier worked under Merit's president and principal stockholder (Mr Stern) when they were at another company. The District Court granted Leatherby's motion and set aside the award. Merit then appealed. The Seventh Circuit reversed the District Court and reinstated its earlier ruling confirming the arbitral award.[48]

Judge Posner accepted that section 18 of the AAA's Commercial Arbitration Rules, which governed the arbitration, as well as the AAA–ABA's Code of Ethics for Arbitrators in Commercial Disputes (Canon IIA) required disclosure of relationships that are likely to affect impartiality or reasonably create an appearance of bias, and the chairman failed to disclose his relationship with Stern. But Judge Posner noted that the broad language of Rule 18 and Canon IIA did not require disclosure of *every* former social or financial relationship with a party or its principals. Here he made his first pronouncement:

> The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and jurors. No one is forced to arbitrate a commercial dispute unless he has consented by contract to arbitrate. The voluntary nature of commercial arbitration is an important safeguard for the parties that is missing in the case of the courts. *Courts are coercive, not voluntary, agencies, and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above expertise. Thus, people who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter. . . . There is a tradeoff between impartiality and expertise* (citations omitted; italics added).[49]

Accordingly, the test for disqualification should be as follows: 'it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between Clifford [the chairman] and Stern was so intimate—personally, socially, professionally, or financially—as to cast serious doubt on Clifford's impartially.'[50]

Judge Posner thus fashioned a new and vague standard ('casts serious doubt'). Not surprisingly, Leatherby failed the test: the chairman's relationship with Stern was a long time ago, and '[t]ime cools emotions, whether of gratitude or resentment.'[51] Time might well seem to have that effect from the

[47] Under Fed R Civ P 60(b). [48] Above n 47, at 676–7.
[49] Ibid, at 679. [50] Ibid, at 680. [51] Ibid.

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upper echelons of appellate discourse. But, in early 1980s, in a $10.6 million case, a party might prefer a stronger reed of impartiality than a questionable maxim. Thus, in Judge Posner's world, impartiality diminishes in importance; a 'serious doubt' test is fashioned without any satisfactory explanation as to how it relates to 'appearance of bias'; and the arbitrator's disclosure requirement is turned into the party's investigatory obligation. The majority opinion in *Commonwealth Coatings* is thereby made invisible.[52]

Merit Ins, despite Judge Posner's passing effort to disclaim any inconsistency with an 'appearance of bias' test, facilitated the rejection of 'appearance of bias' by other influential federal judges throughout the country. For example, in *Morelite Constr Corp v New York City District Counsel Carpenters Benefit Fund*,[53] Judge Kaufman, like Judge Posner, dismissed Justice Black's *Commonwealth Coatings* opinion as dicta, and viewed his task as 'attempting to delineate standards of impartiality on a relatively clean slate'. Upon that slate, the court relied, *inter alia*, on *Merit Ins* and held as follows:

> Mindful of the trade-off between expertise and impartiality, and cognizant of the voluntary nature of submitting to arbitration, we read Section 10(b) [of the United States Arbitration Act] as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award. To do otherwise would be to render this efficient means of dispute resolution ineffective in many commercial settings.[54]

However, Judge Kaufman was unwilling to adopt an 'actual bias' standard, since bias could often be almost impossible to prove and the federal courts—which by statute had responsibility for enforcement of 'private' remedies—could not lend their imprimatur to an award grounded in bias. Accordingly, as 'actual bias' was too high and 'appearance of bias' too low, the court defined the test as follows: 'evident partiality' would be found 'where a reasonable person would have to conclude that the arbitrator was partial to one party in the arbitration. In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances.'[55] If such partiality is found, for example, in a relationship between the arbitrator and one of the parties, the merits of the award itself need not be examined.[56]

Here, at least, is a clear statement of the existence of three possible thresholds and the selection of the middle one, albeit the middle does not yield much

[52] See AS Rau, 'On Integrity in Private Judging'14 *Arbitration International* (1998) 157, which expressly takes as its subject Judge Posner's 'tradeoff between impartiality and expertise', and appears to offer a defence of it on the grounds that arbitration should be understood primarily 'through the lenses of contract rather than of adjudication'. In the present writers' view, Professor Rau's article is flawed in the same manner as Judge Posner's *Merit Ins* opinion: it asserts that the contracting parties to arbitration prefer a hearing that is more a form of 'private self-government' than a form of private adjudication, so that in arbitration, we are 'merely searching' for the 'rules of the game', and therefore 'economic regulation' instead of morality should be the primary concern. This theory has no empirical foundation.

[53] 748 F 2d 79 (2d Cir 1984).

[54] Ibid, at 83–4.

[55] Ibid, at 84.

[56] Ibid, at 85 n 6.

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guidance other than 'more than appearance but less than actual'. From this triptych and the selection of the middle threshold, it can also be seen that the threshold for arbitrators is effectively the same as that for judges.[57] And, if *Morelite* is placed next to *AT&T*, it can further be seen that the American and English standards are in practice similar.

Circuit Court opinions after *Morelite* have not only reaffirmed the middle threshold but have demonstrated the courts' continuing reluctance to set aside awards even though an arbitrator failed to disclose a relationship or dealing that might create an impression of possible bias. In *ANR Coal Co*,[58] the parties' arbitration was governed by the AAA Commercial Arbitration Rules. ANR objected to a name on the neutral arbitrator (chairman) list provided by AAA on the grounds that the individual's law firm had represented a company (Carolina Power) that had a contractual relationship with the opposing party (Cogentrix) in the arbitration. The AAA declined to remove the name, stating that the individual had never personally represented Carolina Power, though his firm had done so, and his firm had only represented the company in a particular type of matter. The chairman himself, after his appointment by AAA, also disclosed that through a temporary law firm merger he briefly practiced with the counsel for the other party in the arbitration. ANR did not renew its objection, but stated in court that it did not renew because a failed challenge would potentially have offended the arbitrator. ANR lost the arbitration. It contended that it learned, post-award, that, contrary to the earlier disclosures, the chairman's firm's relationship was more extensive with Carolina Power and that during the time of the temporary merger his firm had represented Cogentrix. ANR applied to set aside the award, which the lower court did.[59]

On appeal, the Fourth Circuit commented that the United States Arbitration Act, section 10, makes no mention of a failure to disclose as a basis for vacating an award. As for ANR's contention that the chairman's failure to disclose violated AAA Rule 19 (a neutral arbitrator 'shall disclose to the AAA any circumstance likely to affect impartiality'), the Fourth Circuit observed that the rule only requires disclosure of an interest or relationship 'likely to affect impartiality'. ANR's reliance on Justice Black's opinion in *Commonwealth Coatings* was deemed to be misguided, as the factual context was different and

[57] The essential identity of the standards is apparent from the 1974 addition to 28 USC s 455. Subsection (a) provides that '[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*' (emphasis added). See also *Liteky v United States*, 510 US 540, 553 (1994) ('subsection (a) deals with the *objective appearance* of partiality) (emphasis in the original). Justice Kennedy's concurring opinion in *Liteky* explained that, '[f]or present purposes, it should suffice to say that s 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. *I think all would agree that a high threshold is required to satisfy this standard*' (emphasis added, at 557). The US judicial standard, then, is 'reasonable suspicion'; as this is clearly something higher than mere appearance and lower than actual bias, it is also similar to 'real danger'—as Lord Woolf observed in *AT&T*, above.

[58] Above n 39.

[59] Ibid, at 496.

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Justice White's concurring opinion relieved arbitrators of 'extremely rigorous disclosure obligations'.[60] The Fourth Circuit cited Judge Posner's opinion in *Merit Ins* as supporting its holding, and in particular quoted with approval his view that parties choose arbitration because they prefer expertise to impartiality. The court further held that ANR could not carry its heavy burden to meet the onerous standard under 9 USC section 10(a)(2) 'of objectively demonstrating such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives'.[61]

However, the point that Justice Black was getting at 30 years ago was that because arbitrators are within the world of commerce, whereas judges are not, there are pressures and considerations that arbitrators face which, though possibly nebulous, are nonetheless real. In addition, these 'private judges' are not subject to the panoply of judicial constraints, including appellate review. Parties may choose arbitration for any number of reasons, but there is no basis for thinking that any party believes that in so doing it is sacrificing impartiality. Accordingly, a hard line on disclosure—which the arbitrators must take upon themselves—is called for. Surely the chairman in ANR Coal Co, though he might have been experienced in the subject matter of the case, did not believe that he was the only lawyer in North Carolina with the requisite expertise to decide whether a party's attempt to reduce its purchase of coal violated a coal sales contract? There is no reason to believe that the parties to this sales contract chose arbitration because they valued expertise over impartiality. They might have chosen arbitration because they valued confidentiality and privacy, and assumed that an impartial lawyer experienced in sales disputes could readily be found to serve as an arbitral chairman, in which case the sacrifice of appellate review was worth making.

There is also the matter of ANR's contention that it did not renew its objection to the chairman for fear that such a challenge would fail, and the chairman would sit in judgment over a party whom he believed had attacked his integrity.[62] ANR's contention is not difficult to understand: in such circum-

[60] Above n 39, at 498.

[61] Ibid, at 500. The Fourth Circuit set out a four-factor test for the determination of whether a claimant has demonstrated 'evident partiality': (i) the extent or character of the arbitrator's personal interest, pecuniary or otherwise; (ii) the 'directness' of the relationship between the arbitrator and the allegedly favoured party; (iii) the connection of that relationship to the arbitration; and (iv) the proximity in time between the relationship and the arbitral proceedings.

[62] See also *Kiernan v Piper Jaffray Co*, 137 F 3d 588 (8th Cir 1998), where appellants decided not to challenge an arbitrator pre-award (but post-hearing), upon learning that one of the arbitrators had failed to disclose details regarding her relationships with the other party. Relying on *Cook Industries* and *Merit Ins*, the court held that appellants had waived their 'evident partiality' claim, and rejected their contentions that they did not have enough information to have knowingly waived their objection and that the arbitral institution (National Association of Securities Dealers) gave them no meaningful option at the time. The court found that 'while they [appellants] did not have full knowledge of all the relationships to which they now object, they did have concerns about Powers' impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration' (at 592–3). Appellants, it should be noted, had proposed that the other two arbitrators decide the case, but the opposing party refused.

stances would anyone expect a chairman not to believe that his integrity had been attacked? And would anyone, except perhaps for Judge Posner, expect the chairman not to be affected by such an attack? With the abundance of lawyers deeply familiar with contract principles, it is doubtful that crossing one more name off the list would have deprived the parties in *ANR Coal*—or the parties in most commercial disputes—of the necessary expertise for a fair and just decision. In any event, however misguided the US courts have been in not following Justice Black's opinion in *Commonwealth Coatings*, it is apparent that 'party autonomy' has not been the theory guiding their decision-making. The parties who challenged arbitral independence in the cases discussed above certainly did not believe that they had contracted out of certain basic protections by consenting to arbitration.

III. IMMUNITY OF ARBITRATORS

A. England's 'Absolute Immunity with the Exception of Bad Faith' Standard

The immunity of arbitrators is predicated upon the generally accepted proposition that they enjoy quasi-judicial status. It has its basis in the fact that the functions performed by the arbitrators, who are chosen by the parties, can be compared to the acts performed by judges. It has further been submitted that absence of immunity for arbitrators could compromise their integrity in such a way that they would be inclined to make an award in favour of a party who is more likely to sue them.[63] With immunity, arbitrators can do their work without constantly looking over their shoulders in the fear of being forced to defend themselves in the courts.

The principle of judicial immunity in England is long-established. Lord Tenterden CJ observed:

> ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words that he speaks are protected by an absolute privilege. The orders that he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court of appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for

A replacement arbitrator was not possible because the hearing recording mechanism had malfunctioned. Rearbitration was infeasible because of legal expenses. In these circumstances, the court's condemnation of appellants' 'tactical decision' is questionable (at 593).

[63] Above n 2, at 255.

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> damages. The reason is not because the judge has any privilege to make mistake or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear.[64]

This decision was followed in *Sirros v Moore*[65] where, the judge refused to grant bail and the plaintiff was taken away in custody in a deportation case. However, on the following day the Divisional Court granted the plaintiff leave to move for a writ of habeas corpus and he was released on bail. Nine days later, a writ of habeas corpus was issued on the ground that the judge had been functus offcio when he ordered the plaintiff to be detained. As a result, the plaintiff issued a writ claiming damages for assault and false imprisonment against the defendants, the circuit judge and the police officers who had acted on the judge's orders in detaining the plaintiff.

The Court of Appeal supported the judge's immunity and stated that the judge had been acting within his jurisdiction when he directed that the plaintiff be detained in custody, and accordingly, although he had adopted an erroneous course of procedure, he was immune from personal liability to the plaintiff in respect of that act. As Lord Denning MR stated:

> Every judge of the courts of this land—from the highest to the lowest—should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction—in fact or in law—but so long as he honestly believes it to be within his jurisdiction, he should not be liable.[66]

On the ground of public policy, 'neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office'.[67] Arbitral immunity was upheld in the decisions made by the House of Lords in *Sutcliffe v Thackrah*[68] and *Arenson v Casson Beckman Rutley & Co*.[69] *Sutcliffe* was concerned with the liability of architects who were appointed by the plaintiffs as architects and quantity surveyors in connection with a building contract on a RIBA form. The defendants issued interim certificates in

[64] Lord Tenterden CJ in *Garnett v Ferrand* (1827) 6 B & C 611, at 625–6 [1824–34] All ER Rep 244, at 246.
[65] [1975] QB 118, [1974] 3 All ER 776 [1974] 3 WLR 459, 139 JP 2
[66] Ibid.
[67] Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, at 451, [1891–4] All ER Rep 429, at 436.
[68] [1974] AC 727.
[69] [1977] AC 405.

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favour of the contractor which plaintiff duly honoured. However, due to the defendant's negligence, the amount certified was too large. After the plaintiff could not recover the excess from the contractor, who had become insolvent, he sued the defendants. The defendants were held liable at the first instance. However this decision was reversed by the Court of Appeal, which held that the defendants were entitled to immunity as quasi-arbitrators. When the case reached the House of Lords, the judges denied the defendants any judicial immunity protection on the ground that a valuer could not be classed as a quasi-arbitrator, unless he exercised a judicial function.

In deciding the case, the House of Lords established the need for such immunity as follows:

> I think that the immunity of arbitrators from liability for negligence must be based on the belief—probably well founded—that with such immunity arbitrators would be harassed by actions which would have very little chance of success. And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way, or that in some way the immunity put him in a more independent position to reach the decision which he thought right.[70]

Moreover,

> It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognises that, on balance of convenience, public policy demands that they shall all have such an immunity. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation.[71]

Finally, '[s]ince arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred.'[72]

The same issue regarding the arbitrator's immunity was reviewed again in *Arenson v Casson Beckman Rutley & Co*.[73] In that case, by a written agreement, the plaintiff agreed to sell the shares back to his uncle at a 'fair value' on the termination of the employment. The expression 'fair value' was defined in the agreement as being the value determined by the company's auditors 'whose valuation acting as experts and not as arbitrators shall be final and binding on all parties'. After selling the shares back to his uncle, the company's share value increased dramatically due to the floatation. The plaintiff brought an

[70] Above n 69, at 757.
[71] Ibid.
[72] Ibid, at 758.
[73] Above n 70.

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action for negligence against the defendants. Following its decision in *Sutcliffe*, the House of Lords confirmed the arbitrator's immunity within his judicial function, which is determined by whether the person is required to adjudicate upon an existing formulated dispute or receive evidence and arguments from the parties as well as the terms of appointment.[74]

Although it had been conceded by counsel in the case that the arbitrator had immunity, Lord Kilbrandon could see no reason why arbitrators should be immune from liability. His doubts, shared by Lord Fraser, led him to pose the following questions:

> What was the essential difference between the typical valuer, the auditor in the present case, and an arbitrator at common law or under the Arbitration Acts? It was conceded that an arbitrator is immune from suit, aside from fraud, but why? . . . I have come to be of opinion that it is a necessary conclusion to be drawn from *Sutcliffe v Thackrah* and from the instant decision that an arbitrator at common law or under the Acts is indeed a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skills in the exercise thereof, and that *if he is negligent in that exercise he will be liable in damages.*
>
> . . .
>
> Since I can find no satisfactory distinction between the liability for negligence of persons in the position of the respondents and that of arbitrators, had I not been of the opinion that arbitrators at Common Law or under the Acts have no immunity. I would have been unable to agree that the appeal should be allowed.[75] (italics added)

After *Sutcliffe* and *Arenson*, the issue of immunity was also reviewed in *Palacath Ltd v Flanagan*.[76] The plaintiff brought an action against the defendant surveyor alleging negligence in determining the rent under a rent review clause in a lease. According to the terms of appointment, the surveyor had been appointed to determine the rent and the surveyor 'will act as an expert and not as an arbitrator . . . will consider any statement of reasons or valuation or report submitted to him . . . but will not be in any way limited or fettered thereby [and] will be entitled to rely on his own judgement and opinion'. The plaintiff contended that the defendant was under a contractual duty, or alternatively a duty of care, to the plaintiff and the tenant to use the skill and diligence which would reasonably be expected from a competent surveyor in determining the amount of the yearly rent, whereas the defendant argued that he was acting as arbitrator or quasi-arbitrator and therefore was entitled to immunity.

The issue to be determined was whether the surveyor had been appointed as an arbitrator or quasi-arbitrator and was therefore immune from suit. Mars-Jones J believed that a person would only be an arbitrator or quasi-arbitrator

[74] Ibid, see Lord Simon and Lord Wheatley, at 423 and 428.
[75] Above n 70, at 419.
[76] [1985] 2 All ER 161, 274 EG 143 [1985] 1 EGLR 86.

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if there was a submission to him either of a specific dispute or of present points of difference or of defined differences. In this case, as the defendant was appointed as an expert, there was no basis for conferring immunity on the defendant as the parties to the lease had not intended the surveyor to act as an arbitrator or quasi-arbitrator and that they had not intended to set up a judicial or quasi-judicial machinery for the resolution of disputes.

While the majority of their Lordships in *Sutcliffe* and *Arenson* are in favour of granting immunity to arbitrators, the doubts expressed by Lords Kilbrandon and Fraser have planted a time bomb on this issue. This situation is not surprising, as the rationale for such immunity is rarely given. While it was said that, in England, the rationale behind arbitrator's immunity was drawn from the principle of similar functions performed by both arbitrators and judges, serious debates occurred in the House of Lords during the preparation of section 29 of the Arbitration Act 1996. Lord Brightman, when considering the possibility of the arbitrator's failing to take the necessary step for the proper and expeditious conduct of the arbitral proceedings, proposed an amendment to Clause 29 providing that an arbitrator is to be liable if he fails to avoid unnecessary delay or expense. It reads: 'for any costs of the arbitration thrown away if by reason of his own default or the default of his employee or agent he fails to take a step necessary for the proper and expeditious conduct of the arbitral proceedings.'

Lord Denning, Lord Mustill, Lord Roskill, and Lord Donaldson of Lymington disagreed with Lord Brightman's proposal. Lord Donaldson of Lymington used his own experience as an arbitrator as an example to express his concerns about imposing liability on arbitrators and said that he should resent it very much if he was at the mercy of one of the disputants at a later stage and was accused of wasting time and money because he believed that he should not be in default in failing to take that step. In his opinion, it should be the parties who take the necessary steps to avoid costs and delays. He also expressed displeasure about the call for arbitrators to take out professional indemnity insurance by saying: 'If we are to have a straight liability here as an exception to the general exemption contained in the clause, arbitrators will be forced to take out insurance. As a very occasional arbitrator, if I had to start taking out insurance, for my part I would cease to arbitrate at all.'

On the other hand, in Lord Brightman's camp, Lord Hacking pointed out that, in principle, arbitration should be conducted in a proper and expeditious way; and if the fault was with the arbitrator, he saw no reason why the arbitrator should not incurr a financial penalty. Furthermore, he said: 'The noble and learned Lord, Lord Donaldson, whom we do not wish to discourage from presiding over arbitrations, is worried about insurance. All I have to say to the noble and learned Lord and to other noble Lords is that all the rest of us who are in the marketplace offering professional services must have insurance, and I do not see any reason why arbitrators should not contemplate that as well.'

This uncertainty was eventually removed by Section 29(1) of the English

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Arbitration Act 1996 (the Act), which states: 'An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is known to have been in bad faith.' The 1996 Report on the Arbitration Bill, which was prepared by the Department Advisory Committee (DAC) on Arbitration Law and led by Lord Saville, stated that 'Although the general view seems to be that arbitrators have some immunity under the present law, this is not entirely free from doubt.' The Committee endorsed the view that arbitrators should have a substantial degree of immunity because:

> The reasons for providing immunity are the same as those that apply to Judges in our Courts. Arbitration and litigation share this in common, that both provide a means of dispute resolution which depends upon a binding decision by an impartial third party. It is generally considered that an immunity is necessary to enable that third party properly to perform an impartial decision making function. Furthermore, we feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re-arbitrate the issue on the basis that a competent arbitrator would have decided them in favour of that party is one that we would view with dismay. The Bill provides in our view adequate safeguards to deal with cases where the arbitral process has gone wrong.[77]

Section 29 of the Act was intended by the DAC to confer absolute immunity including claims in tort and contract, subject only to bad faith. So far this provision has proven to be successful in practice: we are not aware of any reported cases involving claims against arbitrators in England since the adoption of the Act.

Looking at Section 29 in detail, in the DAC Report, both paragraph 133, stressing the mandatory nature of this provision, and paragraph 136, concluding that the court should be given power to remove or modify the immunity as it sees fit when it removes an arbitrator, have revealed that arbitral immunity originates not from the parties' agreement but from the State. This corresponds with the concessionary theory proposed by the present writers (see Conclusion below), and what Lord Kilbrandon said in *Arenson*:

> The State—I use the word for convenience—sets up a judicial system, which includes not only the Courts of Justice but also the numerous tribunals, statutory arbitrators, commissioners and so on, who give decisions, whether final or not, on matters in which the State has given them competence. . . . You do not test a claim to immunity by asking whether the claimant is bound to act judicially; such a question, as Lord Reid pointed out in *Sutcliffe v Thackrah*, leads to arguing in a circle. Immunity is judged by the origin and character of the appointment, not by the duties which the appointee has to perform, or his methods of performing them.[78]

[77] DAC Report, at 296. [78] Above n 70, at 420.

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II. THE US 'ABSOLUTE IMMUNITY' STANDARD

In the United States, judicial immunity has always been offered to arbitrators.[79] The common law doctrine of judicial immunity was first recognised in *Bradley v Fisher*[80] on the ground that: '[i]f civil actions could be maintained in such cases against the judges, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away.'[81] The same immunity is also extended to arbitrators whose jobs have traditionally been construed to be quasi-judicial in nature,[82] since the United States courts have been convinced that arbitrators usually do not have any interest in the outcome of the awards. Arbitrators are simply appointed to perform a job that is essentially judicial; therefore, they are protected from civil suits under the doctrine of arbitral immunity.[83]

In *Bradley v Fisher*, Joseph H Bradley brought an action against George Fisher, who was one of the justices in the Supreme Court of the United States. He claimed that the defendant wilfully, maliciously, oppressively, and tyrannically deprived his right to practice as an attorney in that court. In his judgment, Mr Justice Field pointed out that the order challenged by the plaintiff was made by the defendant in the lawful exercise and performance of his authority and duty as the presiding justice. In other words it was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction.[84] After confirming that it was a judicial act done within the justice's jurisdiction, the Court set out to explain the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper motives. The Court began by noting that the principle of immunity for acts done by judges 'in the exercise of their judicial functions' had always been recognised through the influence of English jurisprudence. Citing Mr Justice Compton in the case of *Fray v Blackburn*:[85]

> It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed

[79] *Corey v New York Stock Exchange* 691 F 2d 1205. The court said: 'Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association' (at 1211).

[80] 80 US (13 Wall) 335, 20 L Ed 646 (1872).

[81] Ibid, at 649–50.

[82] *Gahn v International Union Ladies' Garment Workers Union* 311 F 2d 113 (3rd Cir 1962), at 114–15.

[83] *Hoosack Tunnel, Dock and Elevator Co v O'Brien* 137 Mass 424 (1984), at 426.

[84] Above n 81, at 347.

[85] 3 Best & Smith, 576. See also *Bradley v Fisher* above n 81, at 349.

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> exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions.

The rationale of such immunity offered to the judges is based on the fact that judges were often called to decide '[controversies] involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings.'[86] As a result, such adjudications invariably produced at least one losing party, who would '[accept] anything but the soundness of the decision in explanation of the action of the judge.'[87] If a civil action is allowed to be brought against the judge by virtue of an allegation of malice, judges would lose their independence. Without such independence, the judiciary's functions will be significantly damaged. As Mr Justice Field stated:

> Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . . and it was observed that if they were required to answer otherwise, it would tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations.[88]

Accordingly, judges are entitled to immunity from civil suit for malice or corruption whilst exercising their judicial functions within the general scope of their jurisdiction.

The judicial immunity established in Bradley also applies to arbitrators. As early as 1884, in *Hoosac Tunnel Dock & Elevator Co v O'Brien*,[89] the Supreme Court of Massachusetts dismissed the plaintiff's claim against the arbitrator for combining, confederating, and conspiring for his own lucre, benefit, and gain to injure and defraud the plaintiff in a personal injury case. Chief Justice Morton J stated that

> It is of the highest importance that judges and others engaged in the administration of justice should be independent, and should act upon their own free and unbiased convictions, uninfluenced by any apprehension of consequences. . . . An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him.[90]

Arbitrator's immunity was also upheld in *Gahn v International Union Ladies' Garment Workers Union*,[91] where the appellee was appointed as the arbitrator

[86] 3 Best & Smith, 576, at 348. [87] Ibid. [88] Ibid.
[89] Above n 84, at 426. [90] Ibid. [91] Above n 83.

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in an arbitration between Sidele Fashions, Inc and the Joint Board of the International Ladies Garment Worker's Union concerning a dispute arising out of the contract between them. The dispute was decided by the arbitrator, and Sidele Fashions sued the arbitrator on the grounds that the appellee forced and coerced them and other association members unlawfully to adhere to and maintain contract provisions which violated the Sherman Anti-Trust Act and other Federal Statutes as well as inflicted heavy fines and penalties on plaintiffs and others in order to prevent them from operating freely and economically in the market place. The Court agreed with the District Court that 'the allegations of the said paragraphs are based upon the conduct of the appellee in his capacity as arbitrator; that in so functioning he was performing quasi-judicial duties and was clothed with an immunity, analogous to judicial immunity, against actions brought by either of the parties arising out of his performance of his duties'.[92]

Corbin v Washington Fire and Marine Insurance Company[93] presented another example of judicial immunity enjoyed by arbitrators. This case arose out of an arbitration between two insurance groups. The arbitration involved a claim of liability for failure properly to protect the subrogation rights of the defendants-insurers in the settlement effected by the other insurance group in connection with an automobile accident in which both insurance groups, through their assureds, were concerned. Pursuant to an arbitration agreement between the parties, this controversy between the two insurance groups was submitted to a board of arbitrators. Both parties to the arbitration submitted their statement of facts and argument in the form of letters to the board of arbitrators. In their statement, the defendants, under the signature of E. C. Heard, as their representative, wrote, among other things:

> We particularly call your attention to paragraph four that it was stated that negotiations were made in good faith by the attorney for Sandra Simmons and settlement was made July 2, 1964, and a release and draft was furnished on that date which is a falsehood. As you know, it is a legal maxim, that false in one thing false in all things. . . . We had made our payment July 7, 1964, for $1118.93 and Samuel J. Corbin was attempting to push their settlement ahead to July 2, 1964, as we have letter from respondent dated Feb 10, 1965, admitting that settlement was not made until July 18, 1964.

The plaintiff sued in libel, asserting that the quoted language defamed the plaintiff in his character as an attorney and adjuster. The defendants claimed absolute immunity, whereas the plaintiff argued for qualified immunity, and that the immunity was lost in instances of malice and excessive defamation.

[92] Ibid, at 115. Also see *Cooper v O'Connor*, 69 App DC 100, 99 F2d 135, 141 (D C Cir 1938); *Hohensee v Goon Squad*, 171 F Supp 562, 568, 569 nM.D.Pa 1959); *Hoosac Tunnel Dock & Elevator Co v O'Brien*, 137 Mass. 424, 426 (1884); *Craviolini v Scholer & Fuller Associated Architects*, 89 Ariz 24, 357 P2d 611, 613 (1960).

[93] 278 F Supp 393; 1968 US Dist.

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Deciding whether to grant defendants immunity, the court first examined the judicial attitude to arbitration and stated that:

> The arbitration of controversies, it has been repeatedly stated in the decisions and evidenced in both state and federal statutes, is favoured in law. It is regarded as quasi-judicial in character and function. Arbitration, even as any judicial hearing, cannot proceed without evidence and the right of the parties to present argument; it cannot operate in a vacuum. It accordingly contemplates and normally requires the receipt of evidence, though not bound strictly in its reception to the rules of evidence.[94]

Moreover,

> A denial of immunity to one offering such evidence or argument would make it difficult, if not impossible, in many cases for the arbitrators to secure the necessary evidence on which to proceed; it would be a severe limitation on the utility of arbitration in resolving controversies and would thwart that public policy which encourages arbitration. Freedom to develop a relevant record and to present pertinent arguments, without fear of reprisal by way of threatened libel or slander actions, is a necessary prerequisite to the fair resolution of any controversy through arbitration.[95]

Disagreeing with the plaintiff's call for qualified immunity or no immunity in the case of malice, the court expressed its concerns and stated that if arbitration is to be safely utilised as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all 'indispensable' proceedings, such as the receipt of evidence and argument thereon. Consequently, the court decided that an absolute immunity is essential to the maintenance of arbitration as an effective instrument for the settlement of controversies.

In *George Corey v New York Stock Exchange*,[96] Corey claimed that the procedures followed in an arbitration proceeding sponsored by the NYSE and to which he was a party were wrongful and caused him injury. Corey sued both NYSE and Cavell, the NYSE's arbitration director, for the damages caused by the conduct of the arbitrators. The court decided that the NYSE, acting through its arbitrators, is immune from civil liability for the acts of the arbitrators arising out of contractually agreed upon arbitration proceedings. By placing arbitrators on the same footing as judges, the court stated:

> The functional comparability of the arbitrator's decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need. As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.

The court also believed there is need for immunity when arbitrators have no

[94] Ibid, at 397. [95] Ibid. [96] Above n 80.

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interest in the outcome of the dispute and should not be compelled to become parties to that dispute. As far as the decision to extend immunity to the board which sponsors arbitration, the court found support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings. This opinion was expressed in the following terms: 'Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association.'[97]

Following the precedents, the arbitrator's judicial immunity was also upheld in *Frank Calzarano v Jonathan E Liebowitz*,[98] where the plaintiff asked for $1,050,000 in damages arising out of an arbitration award rendered by Liebowitz on 5 May 1981. Citing *Cahn*[99] and *Corey v New York Stock Exchange*[100] the court again confirmed the arbitrator's judicial immunity and stated: 'An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him.'[101]

In reviewing this case law, it must be apparent that the contractualist perspective is inadequate. The result in *Corbin* and the prevailing arguments regarding the quasi judicial officer performing quasi judicial duties and public policy discussed in *Cahn*, *Corey*, and *Calzorano* are not based on any contractualist position. The present writers contend that the evidence regarding immunity clearly demonstrates the judicial nature of arbitration and the concession granted by the State.

IV. CONCLUSION

A. Arbitrators' Status: Contractual or Concessional?

Everyone involved in international commercial arbitration must appreciate that the parties choose arbitration and pay for it. The costs include, at least initially, the arbitral tribunal's fees.[102] If the client's perspective is kept in mind, the importance of the arbitrators' taking great pains to practice 'full disclosure, or what used to be called intellectual honesty',[103] becomes readily

[97] Ibid, at 1211.
[98] 550 F Supp 1389; 1982 US Dist.; 97 Lab Cas (CCH) P10, 136.
[99] Above n 83. [100] Above n 80. [101] Above n 99, at 1391.
[102] The prevailing party in the arbitration may have the opportunity to recover all or part of the arbitral tribunal's fees.
[103] This phrase is from a 'non-legal' source: C Lane, 'The Tainted Sources of "The Bell Curve" ' *The New York Review of Books* (1 Dec 1994), at 18.

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apparent. In-house counsel, if they are paying for someone who might order their companies to pay a significant sum to another entity, will have a rigid view and expectation of impartiality as well as responsibility in the case of negligence. It is doubtful whether a paying customer would voluntarily offer arbitrators immunity in case of negligence.

If the arbitration agreement is the foundation stone of international commercial arbitration, one must look at these issues from a contractual viewpoint and explore the nature of arbitration accordingly. In respect of the status of arbitrators, different opinions have been expressed by the contractualists. One is the agent theory invoked by Merlin,[104] who believed that arbitrators were appointed as the agents of the parties to resolve the disputes on their behalf, and any award made by the agents have a binding effect on the parties.[105] Believing that the decision-making process was wholly dependent on the arbitration agreement between the parties, Foelix agreed with Merlin's argument[106] and claimed that the relationship between the parties and the arbitrators was of a private nature. That is, the relationship was that of principal and agent. As a result, no court intervention can be exercised in this relationship because the sole basis of the power of the arbitrator is the arbitration agreement.

Other contractualists focus on the formation of the relationship between the parties and arbitrators. They argue that an arbitrator becomes a party to the arbitration once the appointment as arbitrator is accepted. This can be seen in *Compagnie Europeene de Cereals SA v Tradax Export SA*,[107] where Mr.Justice Hobhouse stated that: 'It is the arbitration contract that the arbitrators become parties to by accepting appointment under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.'[108]

However, both the agent theory and equal party theory do not provide a true picture of arbitration practice regarding an arbitrator's independence, impartiality, and immunity. Indeed, one would expect a sensible principal or the paying party to the arbitration to require the highest standard of independence and impartiality to be imposed upon the arbitrators. Therefore, it is very likely that they would want an 'appearance of bias' standard (or at least a 'justifiable doubts' standard applied with a low threshold regarding 'justifiable') to be imposed upon the arbitrators, because, according to the agent theory, any negligent acts done within the agent's authorisation would find their way back

[104] Merlin, 9 '*Recueil Alphabétique de Questions de Droit*' (4th edn 1829), at 144; translation see A Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Zürich and Schulthess: Polygraphischer Verlag Zurich, 1989), at 34.

[105] Ibid, at 144. See J Lew, *The Applicable Law in International Commercial Arbitration* (Dobbs Ferry, NY: Oceana Publications, 1978), at 54.

[106] J Foelix, *Traite du Droit International Prive* (2nd edn 1847), at 461; translation see Samuel, above n 92 at 35.

[107] [1986] 2 Lloyd's Rep 301.

[108] Ibid, at 306.

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to the principal. It is only reasonable for the paying parties to wish to protect their own interest from their agent's negligence. On the other end of the scale, arbitrators would argue for 'actual bias' in order to protect themselves.

Similar doubts also exist in regard to the equal party theory. As the equal partners in an arbitration, the parties on the one hand and the arbitrator on the other should have the same or similar bargaining power in negotiating the terms and conditions of the contract. In other words, in a sale of services contract, the parties would pay fees for an arbitrator's service, while the arbitrator would provide his skills and knowledge to issue an award settling the dispute between the parties in exchange for the fees. It would certainly not be on an equal footing if the arbitrator can either sue for the fees or abandon the arbitration proceedings altogether when the parties fail to pay for the services, whereas the parties cannot hold the arbitrator liable to the higher standard of bias that the parties would have desired, and such bias possibly deprived the parties of a just decision. Clearly, this is not the equal contractual relationship portrayed by Mr Justice Hobhouse in *Compagnie Europeene de Cereals SA v Tradax Export SA*.[109]

Lord Mustill believes that arbitrators 'stand squarely between the two parties and having no special affiliation to either' because 'the right to nominate is part of the procedure for bringing the tribunal into existence. Once the arbitrator has accepted his office, all connection with his 'appointer' becomes a matter of history'.[110] This model of rigid impartial independence however, does not accord with the courts' treatment of the parties' expectation of independence and impartiality. In fact, the courts both in the USA and England have essentially rejected 'appearance of bias' and have interpreted 'justifiable doubts' in a manner that makes it extremely difficult to sustain a challenge to an arbitrator's impartiality or independence. That is, the courts have overruled the lower threshold standards argued by the plaintiff who is the paying customer, and have imposed a stricter standard that leads away from considering the issue from 'the parties' eyes'. In this sense, the courts' interventions on the issue of independence and impartiality show that it is incorrect to say that the arbitration agreement is the root of international commercial arbitration.

In the case of immunity, the contractualists also fall short. From the contractualist perspective, one would expect the arbitrator's immunity to be dealt with in the arbitration agreement between the parties or the appointment agreement between the parties and arbitrators. But this cannot be the case, since the parties themselves have no contractual power to grant arbitrators judicial immunity. The failure of the contractual theory is even clearer when one focuses on the timing of immunity. For instance, the Hong Kong

[109] Ibid.

[110] M Mustill and S Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn 1989), at 223.

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Arbitration Ordinance, 1996, stipulates that, in the absence of dishonesty, arbitrators are granted immunity for acts in 'relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions'.[111] The word 'purported' implies that immunity can be granted over acts done even before one could imply some sort of contract between the parties and the arbitrator. This removes the concept of immunity from any contractual theory of international commercial arbitration.

It is difficult, if not impossible, to find a place for the issue of immunity in the contractual theory, which emphasises the agent theory or equal party theory. The functions of arbitrators are simply contradictory to the concept of the agent theory. Under general agency principles, the agent works on the principal's behalf and in his best interests and the principal is responsible for the agent's acts within his authorisation. Under this structure, there would be no justification whatsoever for the parties to grant judicial immunity, as they would be the first to be interested in suing the negligent arbitrator in the case of the agent's negligence or any unauthorised acts. The agent theory fails when, as Laine acknowledges, the arbitrator acts not for the best interest of the party (or parties) who has appointed him, but instead acts independently and impartially.

If one turns to the judicial origins of the arbitrator's immunity, further grounds for rejecting the contractual theory are apparent. In fact, the arbitrator's immunity has been granted by means of case law or by legislation, which cannot be contracted out of by the parties. Several reasons have been advanced for the grant of arbitral immunity. They range from public policy, to the need to preserve the independence and integrity of the decision making process, and the need to encourage arbitration. Arbitration may be a private process, but it is stated that it assists in decongesting the courts. That is a benefit for the public and the grant of arbitral immunity protects the integrity of this public benefit. As Lord Salmon explained in *Sutcliffe*, the immunity enjoyed by arbitrators is as a matter of public policy vital to the efficient and speedy administration of justice by the arbitrators. If other persons doing the same work need this judicial immunity, then it can be argued that the same should be extended to arbitrators, so that, at the very least, they and the parties should appreciate the judicial nature of the arbitrator's work.

The public policy consideration clearly shows that the State's powers play the major role in this matter. As Lord Mustill said:

> Parliament has already done this on several occasions, with a view to making the system work more effectively, by attaching to some of the relationships created by an arbitrator special rules quite different from those which would follow from ordinary principles of contract; and the common law has also taken one step in that direction by conceding to the arbitrator a special immunity from suit in negligence.[112]

[111] Hong Kong Ordinance 1996, ch 341, s 2GM.

[112] Above n 115, at 223.

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Judicial immunity is granted to arbitrators regardless of the parties' agreement. Therefore, there must be serious doubts whether the contractual theory can accommodate the issue of immunity. A negative answer must be given to the questions whether the arbitrator's immunity can be contracted out of the arbitration agreement and whether an arbitration agreement that expressly excludes the arbitrator's immunity is valid.

The State, instead of the arbitration agreement between the parties, controls the structure and operation of international commercial arbitration. The supervisory power of State is crucial, especially the State where the place of arbitration is located. Thus, it can be said that arbitrators are given a special kind of status and their power is drawn from the State by means of the rules of state law. The awards made by the arbitrators are regarded as having the similar status and effect as a judgment handed down by judges sitting in a national court. Moreover, New York Convention awards may be enforced by the courts where recognition or enforcement is sought either in the same way as foreign courts or even more readily than foreign court judgments.

The delegation theory properly explains the status of arbitrators. According to this theory, in order to settle disputes between parties, an arbitrator must possess a delegated authority given by a State in which he sits to conduct the arbitration. An award made by an arbitrator lacking this authority will be void and can be challenged. Due to this delegated power, it is denied that the arbitrator's power originates from the parties' arbitration agreement; rather, the arbitrator's power is drawn from the State by means of the local law, on the ground that it is in the public interest to permit private individuals to decide disputes when the parties have agreed to proceed privately. This is the argument supported by Mr Moutulsky, who stated: 'Arbitrators are individuals whom the legal system permits to perform a function that is in principle reserved to the State.'[113] Furthermore, arbitration is regarded as an exception granted by the State to its monopoly over the administration of justice in its jurisdiction.[114] Dr FA Mann believed that this was the inevitable result of the general proposition that 'every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law'.[115]

Because of the special status granted by the State, arbitrators are regarded as resembling judges of national courts. The only difference between them, as illustrated by Niboyet, is that a judge 'derives his nomination and authority directly from the sovereign,' whilst an arbitrator 'derives his authority from the sovereign but his nomination is a matter for the parties'.[116] It is the State

[113] Moutulsky, Ecrits, Dalloz, Paris (1974) at 14; translation see Samuel, above n 92, at 55.
[114] Ibid.
[115] Mann, '*Lex Facit Arbitrum*', in P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (1967), at 106.
[116] Niboyet, *Traité de Droit International Privé Français* (Paris, 1950), para 1985, at 137; cited from Lew, above n 93 at 53. Although upholding the status theory of arbitrator, Lord Mustill does not agree with the analogy between arbitrator and judges, above n 115 at 223.

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that is the ultimate guardian of the level of independence and impartiality to be imposed upon arbitrators, and whether immunity shall be offered to arbitrators.

The present writers advance the concession theory,[117] which emphasises that party autonomy can only have the breathing space that the State has conceded to it. This takes us very close to the delegation theory mentioned above, where the State has a monopoly in administering justice. Under both the delegation and concession theories, had the State not wished to allow certain types of disputes to be submitted to arbitration in first place, arbitration would have probably never been initiated by the parties.

However, the concession theory is more logical in the sense that the concession of the State sets the 'jurisdictional' boundaries of arbitration. The existence of international arbitration is accounted for by the *mutual* concession of authority of signatory States to international instruments like the New York Convention.

The present writers therefore submit that concession can be made to a number of entities and a State can concede some of its power to grant a prerogative to the parties and to the arbitrator, such as immunity and higher threshold of standard of bias. In controlling the level of independence and impartiality required by the arbitrators and blessing the arbitrators with immunity, the State effectively runs a utilitarian calculation. It will weigh the detriment that such immunity and duty can cause against the benefits distilled from the public policy reasons to find that the concession is worthwhile. It cannot be plausibly denied that the arbitration mechanism would be crippled and the arbitral procedures and awards would be regarded as unlawful or void without authorisation from the State. By means of legislation, and maintaining certain limits, the State allows parties to choose arbitration as an alternative method of dispute resolution outside the traditional court systems. Furthermore, after recommending or legalising arbitration as an alternative means of dispute resolution, the State offers the arbitrators a quasi-judicial status which allows them to act as arbitrators and settle the disputes between the parties. Because of this special judicial status, as well as the duties imposed upon, arbitrators are granted immunities with the intention of safeguarding the public interest and the efficiency of arbitration procedures. As well as duties and immunity, they are given the power to avoid unreasonable obstacles or deliberate delays made by the parties during the arbitration procedures. Consequently, the decisions made by the arbitrators are regarded as binding on the parties, provided no irregularities as listed in Article V of the New York Convention 1958 can be established.

Using the issues of independence, impartiality, and immunity, it is the present writers' intention to highlight the reality that, from 'real danger of

[117] H Yu and E Sauzier, 'From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration' 3 *International Arbitration Law Review* (2000) 114.

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bias', 'cast serious doubt' to 'absolute immunity', it is the State that decides such issues and establishes the judicial nature of arbitration. If the parties had the choice, any 'reasonable man' would prefer 'appearance of bias' or 'justifiable doubt', as recommended by the IBA Report, as the standard policing of the arbitrator's impartiality and independence, as well as 'qualified immunity' in the case of the arbitrator's negligence. After all, it is the parties who are paying for private justice to be done.

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